United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

B/P/S

74-1268

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

HAROLD BIGELOW and VIRGINIA BIGELOW and
COOPERATIVE FIRE INSURANCE ASSOCIATION
OF VERMONT,

Plaintiffs-Appellants,

v.

AGWAY, INC. and KEMIN INDUSTRIES, INC.

Defendants-Appellees.

Appeal from the United States District Court
for the District of Vermont, Honorable
James S. Holden, Chief Judge.

BRIEF FOR DEFENDANT-APPELLEE
AGWAY, INC.

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A. Was there sufficient evidence to warrant submitting the case to the jury on the issue of proximate cause.

B. Was there sufficient evidence to warrant submitting the case to the jury on the issue of reliance, or negligent misrepresentation, as far as Defendant Agway was concerned.

C. As a matter of law, did assumption of the risk bar the Plaintiffs' recovery.

STATEMENT OF THE CASE

Agway, Inc. adopts the Statement of the Case contained in Appellee Kemin Industries, Inc.'s brief.

STATEMENT OF THE FACTS

Agway, Inc. adopts the Statement of Facts as set forth in the brief of Appellee Kemin Industries, Inc.

ARGUMENT I

THE PLAINTIFFS BELOW DID NOT PRODUCE SUFFICIENT EVIDENCE ON THE ISSUE OF PROXIMATE CAUSE TO WARRANT SUBMISSION OF THE CASE TO THE JURY AND THE TRIAL COURT CORRECTLY DIRECTED A VERDICT AGAINST THE PLAINTIFFS.

The Appellants admit that one cannot maintain an action for negligence unless the alleged negligence is a legal proximate cause of the injury of which one is complaining. (Appellants' Brief, Page 6); Cameron v. Bissonnette, 103 Vt. 93 (1930);

Humphrey vs. Twin State Gas & Electric Company, 100 Vt. 414 (1928).

And the trier of fact cannot base a finding of proximate cause on conjecture, surmise or speculation.

In the instant case the trial court recognizing these two legal principles correctly directed a verdict against the plaintiffs below.

To have done otherwise on the evidence in this case would have necessitated that the jury be permitted to speculate and conject.

The fatal flaw in the evidence that would necessitate jury speculation is the unaccounted for and unaccountable 1000 bales of hay of June 12, 1971 and the hay baled on June 14, 1971 and June 15, 1971.

The 1000 bales of hay on June 12, 1971 is indicated as the very first hay baled by the plaintiffs below during the haying season of 1971. (Plaintiffs' Exhibit #6)

The plaintiffs did not use any Hay Savor until the next day, June 13th. The plaintiff would not testify that he used any Hay Savor on June 14, 1971 or June 15, 1971.

Q. All right, was June 13th the first time that you used the Hay Savor product?

A. Yes, it was.

Q. Are you sure of that?

A. Yes.

Q. No question about that?

A. No.

Q. Did you use it on the 14th?

A. I don't recall if I did that day or not.

Q. Did you use it on the 15th?

A. I don't recall that day either.

Q. But you do recall that you used it on the 13th for the first time?

A. Yes. (T164)

Never throughout the entire course of the trial did the plaintiffs below offer evidence that the 1000 bales made on June 12th was not stored in the very area where the hot spot developed. This alone would be sufficient to warrant taking the case from the jury as the trial court properly did. But to make matters worse, the direct evidence was that the hay that was baled on June 14th and 15th was placed in the very barn designated by an "x" on the blackboard during the trial, where the hot spot developed.

Q. And the hay that you baled on the 13th through the 16th, where was that put, in the barn?

A. Where the "x" is. (T155)

The commingling of treated and untreated hay was fatal to the plaintiffs' case.

During the course of the trial, the plaintiff, Harold Bigelow, contradicted not only his own testimony given earlier at the trial but also testimony given at a deposition on November 15, 1972, and the written notes made by plaintiff, Virginia Bigelow. In the written notes lies further justification for the action of the trial judge in directing the verdict against the plaintiffs. The notes were introduced as evidence and appear as Plaintiffs' Exhibit #6.

Even Mr. Bigelow admitted that the notes were correct when they conflicted with his testimony.

Q. If they do, which will be right?

A. The notes. (T151)

The value, reliability, and accuracy of the notes was not an issue, even plaintiffs' counsel recognized that and it was he who introduced them as an exhibit after the following examination of his client, Harold Bigelow:

REDIRECT EXAMINATION BY MR. LANGROCK:

Q. Mr. Bigelow, the notes that Mr. Haugh is referring to, who kept these notes?

A. My wife did.

Q. Yes, and what was the procedure for keeping them, how would she make these notes?

A. Usually at night when I came in from work, I would tell her, she'd write them down.

Q. And you'd tell her how much hay you had baled that day?

A. Yes.

Q. Would that be an accurate count, or a guess?

A. No, it wouldn't.

MR. HAUGH: Just a second, this is leading this man quite badly right along, he's testified all day.

Q. How do you determine how much hay to tell her that you had baled?

A. By the heavy counter on the baler.

Q. And did you take count of the baler?

A. Yes.

Q. I show you Plaintiffs' #6 for identification, would you look through those and tell me if you recognize them?

A. Yes, I do.

Q. What are those?

A. Those are notes on, that we took down when during 1971.

Q. What period are those particular photo copies cover?

A. From the 19th of April.

Q. And through to when?

A. I put down as far as the 8th. (T151-152)

The plaintiff had earlier admitted to the accuracy and completeness of the notes kept by his wife.

Q. Doesn't your wife keep pretty accurate and complete notes of most everything that happens on your farm?

A. She does a pretty good job, yes. (T124)

And he also testified as to the manner in which these notes were made.

Q. Those were the notes that she had made and it was her habit to write things down on a diary basis, day to day, about what happened on the farm, is that right?

A. Yes. (T125)

Time and again the notes were acknowledged by the plaintiff himself as accurate.

Q. Uh huh, is that the fact?

A. That is what my notes say. (T171)

Even when it became apparent under severe cross-examination that his wife's own notes were contradicting his own testimony, the plaintiff, Harold Bigelow did not question their accuracy.

Q. Is that true?

A. That's what it says. (T174)

When confronted directly with the issue of the accuracy of the notes under severe cross-examination, the plaintiff chose evasion and then silence rather than repudiate the contents of the notes.

Q. And didn't you tell me those notes were accurate?

A. I don't recall.

Q. Well, didn't you just tell me a few minutes ago that they were accurate and that if they contained a statement that it was true?

A. (No response). (T174)

Mrs. Bigelow, the writer of the notes testified that she made them as events happened on the farm from what her husband told her each day.

Q. Could you tell me what the procedure was in compiling these records?

A. As things happened during the day sometimes I write them down right off, other times, I would write them down at night. I talked with Harold and sometimes if he was busy, I just write them down as I remembered them. (T323)

Mrs. Bigelow was active in the farm operation and kept the farm books. (T329-330)

Although conflicts in testimony are for the trier of fact to resolve, there was no conflict concerning three

crucial facts which prevent submission of the case to the jury on the issue of proximate cause.

1. The plaintiff, Harold Bigelow, baled 1000 bales of hay on June 12, 1971. (See Plaintiffs's Exhibit #6 reproduced in Appellee's Appendix)

2. The plaintiff used Hay Savor for the first time on June 13, 1971. (T164)

3. Hay baled on June 14th and 15th was never established as being "treated hay" although it was placed in the same area of the barn with hay baled on June 13th and 16th which was treated. (T155,164)

Resolving all other conflicts in favor of the plaintiff, there is no longer any issue for submission to the jury on proximate cause because it would be pure speculation and conjecture to say whether or not the product complained of (Hay Savor) had anything to do with the resulting fire on the plaintiffs' farm without further evidence as to the 1000 untreated bales on June 12th and their location in the barn and the commingling of the treated and untreated hay on June 13-16.

The size of the hot spot was approximately 5' x 10', (T381, 407) and contained about 150 bales of hay. (T408) That being the case there is no way of knowing whether or not the 1000 untreated bales were part or all of the hot spot that developed in the barn or whether the hot spot was treated or untreated hay. The burden of proof was on the plaintiff and a

failure to sustain it warranted the court from directing a verdict against the plaintiff.

In short, there was no evidence whatsoever as to which hay was the source of the fire which occurred on July 8th. Under these circumstances, to allow the case to go to the jury would be to require them to speculate in this regard. The trial court recognized this in stating:

> "...the court has gone over in great detail all of the evidence that was presented in the case and the court has come to the reluctant conclusion that there is no evidence or insufficient evidence in this case, upon which legal liability can be established on the facts presented against either of the defendants in this case.
>
> The plaintiffs have also failed to establish by competent evidence that the hot spots that testified in the various bales of hay were bales that were treated by Hay Savor and that the product [that] was produced by Kemin and marketed by them through Agway, was a substantial factor by way of causation [of] the fire that followed..." (T575)

Because of the unaccounted for and unaccountable 1000 bales of hay made on June 12th and the commingled hay, it became impossible for the trier of fact to link the hot spot which developed on June 19th with the use of the product Hay Savor on June 13th or June 16th without speculating. The court recognized this shortage in proof and so stated in its opinion when it directed a verdict against the plaintiff.

> "However, there is no evidence that the hay that was baled on June 15th developed hot spots or that it was the source of the fire which occurred on July 8th." (T576)

The court recognized that it made little difference which theory of recovery the plaintiff was claiming under with the state of the evidence such as it was. Either way, the shortage in the evidence prevented the trier of fact from reaching a verdict for the plaintiff. Any such verdict would by necessity have to be based upon surmise and conjecture for unless the 1000 bales of untreated hay made on June 12th were accounted for and the commingled hay disregarded, no one could say with reasonable legal certainty that the use of the product Hay Savor was in any way connected with the hot spot and the resulting fire.

Therefore, considering the evidence in the light most favorable to the plaintiff, there was no evidence upon which a jury acting reasonably could find liability on the part of the defendant, Agway or defendant Kemin without speculating.

Although the argument in Part I of Appellee Agway's brief is sufficient to dispose of the entire case on any theory, the following points further justify action by the trial court in directing a verdict against the plaintiffs for defendant Agway.

II

THERE WAS NO EVIDENCE OF RELIANCE OR NEGLIGENT MISREPRESENTATION ON THE PART OF AGWAY, INC.

Any reliance by the plaintiffs upon statements or representations to bale the hay at any given time with any given moisture content were not made by defendant Agway or its agents, employees or servants. This is clearly recognized

by the testimony of plaintiff Harold Bigelow under cross-examination.

> Q. Now, did, Stuart Newton ever tell you that it was okay to put hay in the barn?
>
> A. I don't recall.
>
> Q. By you don't recall do you mean, well, I'll strike that. This, think about it for a minute, he came to your farm, that was Stuart Newton on the 16th, with Mr. Nelson from the factory?
>
> A. Yes.
>
> Q. And Mr. Nelson had a moisture meter, I think you testified?
>
> A. Yes, he had a meter.
>
> Q. All right, did Stuart ever tell you that it was okay to put any of that hay in the barn?
>
> A. I don't recall Stuart did or not.
>
> Q. Does this refresh your recollection on Page 7, [referring to deposition] question: "Was there anyone from the distributor, Agway, there at the time" and you said, "Yes, Stuart Newton was there". The next question: "Did he give you any advice that the hay was fit for baling? And your answer was: "No, he didn't," Does that refresh your recollection?
>
> A. No he didn't give me advice to put it in the barn, to bale it.

Any previous literature or brochures that were in fact given to Mr. Bigelow by Stuart Newton, the Agway salesman, would be immaterial with regard to any reliance theory, since the plaintiff had not in fact relied upon them for any instructions contained in them as he had not put any hay in his barn until the day that Stuart Newton and the manufacturer's representative, Mr. Nelson, came to his farm. This fact was

also admitted by the plaintiff Harold Bigelow under cross-examination.

Q. So far as you know, you had not done any baling before Stuart Newton and Mr. Nelson got to your farm on June 16th?

A. I'd say, no.

Q. All right, now you testified, or strike that. And I take it that the 16th of June was the first day that you were going to do any baling at all?

A. Yes.

Q. You hadn't baled at any time before that?

A. No.

Q. So this was the first baling day, as far as that farming season was concerned?

A. Yes.

Q. And you hadn't, since you didn't do any baling, you hadn't put any hay in the barn that year, at all?

A. No.

Q. That is as of the 16th of June 1971 now that is awfully important, Mr. Bigelow. If, - I want you to think about that for a minute. Was there any hay in your barn at the time that Stuart Newton and Mr. Nelson from the factory came to your farm?

A. No.

Q. Are you sure of that?

A. I don't recall there was, I'd say "no". There might have been some broken bales or something from last year, but I mean -

Q. No fresh hay from that year, 1971?

A. No.

Q. All right, are you sure about that?

A. Yes. (T111-112)

Even in the Appellants' Brief, only testimony concerning representations and assurances allegedly made by Mr. Nelson are cited as evidence of reliance. (Appellants' Brief 8, 9, 10 & 11). There is no claim that any statements made by Stuart Newton, the Agway salesman, or any other Agway employee were relied upon by the plaintiff in baling hay or placing it in the barn.

With the manufacturer a direct defendant in the suit, there could be no legal responsibility on the part of Agway for any representations made by the manufacturer's employee to the plaintiff under the circumstances as set forth in the evidence. Any claim of misrepresentation of the use of the product or reliance upon representations or assurances were totally unsupported by the evidence as far as defendant Agway was concerned. Mr. Nelson was an employee of the manufacturer, Kemin Industries, and not of Agway. This fact is without dispute and was brought out by the cross-examination of the Appellants' attorney.

Q. Would you please state your full name, sir?

A. Yes, Thomas Eugene Nelson.

Q. And where do you live Mr. Nelson?

A. I live in Columbia, Maryland.

Q. And what is your occupation, sir?

A. Sales Representative for Kemin Industries, Des Moines, Iowa.

Q. How long have you been with Kemin Industries?

A. Since 1960, that would be thirteen or fourteen years. (T206)

Mr. Nelson was, in fact, the brother of the owner of Kemin Industries.

Q. Does any member of your family hold stock in the corporation?

A. Yes.

Q. Who is that?

A. R. W. Nelson.

Q. What relationship is he to you?

A. He is my brother.

Q. What is his position with the company?

A. He owns it.

Q. And this was true in the summer of 1971?

A. That's correct. (T206-207)

And further the plaintiff's theory of reliance recognized this fact both at the trial and in its brief on appeal. There is no claim that any representations or assurances were made by any employee or agent of Agway. Appellants' Brief states as follows:

> "In summary, the evidence recited above provides an adequate basis for a finding that Mr. Bigelow's barn fire was caused by his storage of moist hay in reliance upon the negligent assurances of the defendants' representative, Mr. Nelson." (Appellants' Brief Page 13)

III

THE THEORY OF THE CASE BELOW SHOULD GOVERN AND NEW OR DIFFERENT THEORIES OF RECOVERY SHOULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

With regard to the argument made in the Appellants' Brief under a theory of statutory warranty found in the Uniform Commercial Code as recited in 9 (a) V.S.A. § 2-313 and 9 (a) V.S.A. § 2-315, this claim is without merit. No such allegations or mention of the warranties of the Commercial Code were either pleaded or raised at the trial and cannot now be considered for the first time on appeal. The plaintiff below tried the case below on a theory of negligence or misrepresentation. Appellants' counsel conceded this fact at the close of all the evidence.

THE COURT: The Court understands, Mr. Langrock, that you make no claim at this time, that the product was defective and then presented any evidence to that effect?

MR. LANGROCK: In and of itself, no, Your Honor, I do make the claim that the product was not capable of doing what it is advertized to, under the circumstances, the way my client was advised to put it in the barn by MR. NEWTON and by MR. NELSON.

This court should not now consider other or different theories of liability raised for the first time on appeal. Dindo v. Denton, 130 Vt. 98, 287 A. 2d 546 (1972); Griffin v. Griffin, 217 A. 2d 400, 125 Vt. 425 (1966); Davis v. Kneeland Lumber Co., 196 A. 2d 572, 124 Vt. 70 (1963).

IV

THERE WAS NO EVIDENCE OF PRODUCT FAILURE.

There was no evidence whatsoever that the product (Hay Savor) was in any way defective, nor did plaintiffs' counsel claim any defect even after all the evidence was in.

"THE COURT: The Court understands, Mr. Langrock, that you make no claim at this time, that the product was defective and then presented any evidence to that effect?

MR. LANGROCK: In and of itself, no, Your Honor,..." (T342)

Therefore products liability was not an issue as such. The case was tried on a theory of negligence or negligent misrepresentation.

V

ASSUMPTION OF THE RISK BARS THE PLAINTIFFS' RECOVERY

The evidence in the case was sufficiently clear that as a matter of law the doctrine of assumption of the risk would bar any recovery claimed by the plaintiff. Although it is ordinarily true that the question of assumption of the risk is one of fact for the jury; it is otherwise where the material facts are undisputed and lead but to one reasonable deduction; then the question is always one of law for the court. Steele v. Fuller, 158 A. 666, 104 Vt. 303 (1932). The trial court recognized this and so stated

although it did not base its ruling upon assumption of the risk as the trial court felt the other shortages in the evidence were so strong that it was not necessary to do so.

Said the court,

> "this makes it unnecessary for the Court to reach the question of whether or not the plaintiff assumed the risk. Indeed, there is substantial evidence that the plaintiff did assume the risk within the doctrine of our cases, however, the Court doesn't feel it necessary to predicate its ruling on that aspect of the case." (T577)

It is proper for this Court on appeal to examine the record with regard to the doctrine of assumption of the risk even though the trial court did not base its ruling upon that doctrine. The trial court will always be affirmed upon any legal ground shown by the record even though not relied upon by the trial court at the time of its ruling. Peck v. Patterson, 125 A. 2d 813, 119 Vt. 280 (1955).

Unlike some other jurisdictions, Vermont has adopted the rule that contributory negligence and assumption of the risk overlap at a point where the plaintiff enters upon a course of conduct involving danger. Because of this actual knowledge is not necessary in Vermont to an assumption of the risk.

This was pointed out as long ago as 1910 when the Vermont Supreme Court stated,

> "in the case in hand, the plaintiff testified that he did not know that the canvas and cylinder would draw his hand in. We need not inquire what effect is

> to be given to this statement, for actual knowledge was not necessary to an assumption of the risk.
>
> The true test is, not whether he actually knows and comprehends, but whether, in the circumstances he ought to know and comprehend the dangers which beset him. And this rule, as is plain from a careful reading of our own cases above cited, applies...when the dangers are so apparent that one...would, in the circumstances and by the exercise of due care, know and appreciate them and how to avoid them." Wiggins v. E. Z. Waist Company, 83 Vt. 365, 370, 371; 76 A. 36 (1910).

The Vermont Supreme Court reaffirmed this doctrine in 1954 when it stated that the knowledge necessary for an assumption of the risk is an objective knowledge and not subjective to the plaintiff. That is, the doctrine of assumption of the risk applies when the plaintiff is charged with the knowledge of the danger even though he claims not to have had actual knowledge of such fact. Wiggins was cited with approval. See Painter vs. Nichols, 118 Vt. 306, 310; 108 A. 2d 384 (1954).

The clear and convincing evidence of assumption of the risk permeated the entire trial. The plaintiffs' farm was located two miles from the village (T129). It was a mile or a mile and a half away from the nearest fire hydrant (T129). The plaintiff admitted that as far as fire was concerned, his barn was in a hazardous location.

> Q. So it would be fair to say, wouldn't it, if a fire got started in this barn the possibility of saving it would be pretty remote?
>
> A. Yes. (T129)

The plaintiff knew from his experience as a farmer and from hearing others talk about it that when hay gets to be 170° F it is hot hay and should be removed from the barn (T131). Even though the plaintiff became aware that his hay was hot on June 19, 1971 he took no steps whatsoever to remove it from the barn which was in jeopardy of total destruction if a fire got started because of its distance from the nearest fire hydrant. To make matters worse the plaintiffs continued to place other hay in the barn after the heating problem had developed. The plain effect of this would be to increase the danger of fire by placing more combustible material in the barn. Ordinary prudence would have dictated removal of hot hay but the plaintiffs continued to place other hay in the barn and refused to remove the hot hay. These facts were brought out on cross-examination.

Q. Now, so for ten days, no, let's see, seven days from the 19th until the 26th, when you knew, from your experience as a farmer, that there was hot hay in this barn, you continued to put in hay in the rest of the barn?

A. Yes, I did.

Q. Now, when you knew there was hot hay in this part of the barn, did, you did not remove it, did you?

A. No.

Q. You didn't remove the other hay?

A. No.

Q. You just let it cook?

A. (No response).

Q. Is that fair?

A. Well, I didn't remove it.

The plaintiff, Harold Bigelow, knew that the temperature of the hay was 184° F on June 19th (T142). He had been handed a pamphlet entitled "Will Your Barn Burn This Summer?" by Erden Bailey, the County Agent, (T366). The leaflet is set forth in Appellee Agway's Appendix 7a-8a. The leaflet states in large letters "185° F REMOVE THE HOT HAY." (Appendix 8a). The front page of the leaflet states, "Danger of spontaneous combustion in hay demands spontaneous action to prevent it." (Appendix 7a). In spite of this admonition, the plaintiff took no action whatsoever but continued to put more hay in the barn until July 8, 1971. The plaintiff did not want to remove the hay until July 8, 1971 as he was busy haying and wanted to put all his other hay in the barn before he began to take out any of the hot bales (T318, 319).

Had the plaintiff, Harold Bigelow, wanted to remove the hot hay at anytime, Agway was willing to have personnel available to help him (T318).

On June 21, 1971, Mr. Bigelow and Mr. Newton, the Agway salesman, went to the St. Albans Fire Department to get some advice concerning the situation at the Bigelow farm. In response thereto, Mr. Rodney Paquette visited the Bigelow farm on June 21, 1974 (T357). Mr. Paquette was a fireman. He climbed up on the hay and noticed a hot spot underneath an

opening in the roof (T357b). Mr. Paquette advised Mr. Bigelow "to remove the hay immediately as the situation was very hazardous." (T358). Two days prior, Erden Bailey, the County Agent, had advised Mr. Bigelow to wet the hay down and remove it with the fire department standing by (T367). Stuart Newton, who was also a farmer (T411), told Mr. Bigelow, "I think we ought to get it out of there." (T428).

Even after the hay had risen into the 200° level and above, Mr. Bigelow had the opportunity to remove the hay after carbon dioxide was applied through the efforts of Andrew Tessman, resident agricultural engineer at the University of Vermont (T450). With the use of a probe made under the guidance of Mr. Tessman, carbon dioxide was administered to the hot hay and the temperature was reduced to the 170° temperature range (T476). At that time in Mr. Tessman's professional opinion, "just using some plain common sense and having standby equipment I would have been willing to work on it with them" to remove the hay (T476). Mr. Tessman testified that in spite of any hazards that might exist, the only course of action was to take precautions but take the hay out of the barn (T477).

In spite of all of this advise, Mr. Bigelow did not want to remove the hay from the barn until he had in fact finished his other haying and placed that hay in the very barn where the hazardous situation was located. There was no evidence

whatsoever of any advice not to remove the hay. All advice was to the contrary. Therefore, the failure to remove the hay and risk destruction of the barn by spontaneous combustion was voluntary on the part of Mr. Bigelow. Clearly he had been informed of proper action to the contrary and should be precluded from claiming any negligence on the part of others by the voluntary assumption of the risk under all the circumstances as brought out in the evidence.

CONCLUSION

The judgment of the District Court should be affirmed because of the shortages in the evidence concerning proximate cause and because of the doctrine of assumption of the risk on the part of the plaintiffs.

Dated at Rutland, Vermont this 25th day of June, 1974.

AGWAY, INC., DEFENDANT-APPELLEE

By Lawrence Miller

Lawrence Miller, a member of the
firm of Miller & Hill, Esqs.
Service Building
Rutland, Vermont 05701

APPENDIX

(Plaintiffs' Exhibit #6 - Handwritten notes reproduced on typewriter with emphasis on June 12th)

1971

April 19th started building fence. Tore down two and put up new electric ones. Built a new four strand fence around heifer pasture up to the woods.

May 8th finished fences.

May 13th started wheel harrowing the piece behind the house. Both harrows worked it. Borrowed Albert's harrows (smoothers) to go over it.

May 20th planted sorghum, alsike (2lbs.) timothy (3) and alfalfa (8) together.

June 1st sorghum is coming up.

June 2nd, 3rd & 4th worked on Hesston, wagons and put chemical sprayer on baler. Fixed new doors.

June 5th washed Hesston and baler. Now already to hay.

June 7th started mowing hay behind tool shed up to the pond.

June 7th it rained today on the hay but it didn't hurt it because it hadn't started to dry yet.

June 8th it stormed today. The hay got wet.

June 9th it started to clear up today. It is cloudy. The hay is going to dry. The sorghum is really growing. Went up to Alberts today and dug hole for Bud's septic tank.

June 10th started mowing hay down the road by the big elm.

June 11th started mowing the remainder of the field.

JUNE 12TH RAKED HAY AND BALED 1000 BALES. HIRED DAVID. [Emphasis supplied]

June 13th baled 1500 bales and hired Larry and David.

Harold's father milked cows. I got them.

Baled until 7 o'clock. Broke belt that goes around the 3 pulleys on the thrower 6 inch.

June 14th mowed down field between sorghum and manure pile. David and Jim tore down electric fence on roadside of sorghum field. Mowed for Fred Nelson.

June 15th tedded hay down road and fixed wagon. Got things ready for tomorrow. Mowed new stuff

June 16th raked hay after dew was off ground. About 11 it was too green to bale. Agway, Newton & Tom Nelson came down around one o'clock. Said to use the hay savor on it. Just right to bale, using 2 lbs. per ton. Took a moisture about 27-30% test. Kids said bales are heavy. We hired Marshall to milk. Baled all of the field about 1200 bales. Hired Larry too. Mowed up by dump.

June 17th raked hay up back of out behind sorghum. Was supposed to bale yesterday with hay savor but couldn't get to it. Started baling at 11. Hired Moose & Larry. Put in about 1600 bales. Jim mowed.

June 18th tedded hay up by dump; no dew, so started baling. Put in about 1200 bales. Jim mowed down road that we seeded last year. He mowed the two three-cornered chuncks too. Baled rest up by dump and some up by woods.

June 19th hay is really getting hot. Told Stuart about hat heating. Said Mr. Bailey would bring down a probe. Put down about 7' in mowed read 184. Later on in day it read 192-196.

Jim mowed up by elms near dump piece. Stuart said the man from

the chemical company would be down Monday morning. Stuart came down and checked it with Harold.

June 20th baled down by heifers and two 3 cornered chuncks. Put in about 1600 bales. Baled some up by woods. Temp. 200°, didn't sleep.

June 21st going to bale. Looks like rain. Went up by woods and baled some 500 bales. Agway (Stuart) and man from chemical co. came to see about hay hot. Took temperature of mow about 201° when they were here. Man from chemical co. said he was sorry. No answers. It rained and they stayed in the barn. He stayed from 1:50 for 4:45. Harold had to do chores so they left. Hay got wet. Chief came and looked. Didn't sleeph all night worried about hay. Larry & Moose stayed to check temp.

June 22nd raind a little and cleared up later. Mow still hot. Going to have to do something. No hay put in. Mr. Bailey came to see how mow was. Stuart came down too. Mow up to 206°

June 23rd called fire station and talked with chief asking about Co2 He said would cool off some. But would be expensive. Said he wouldn't let his men take it out. He said to air it out or fill up with cold water. Mr. Bailey said that if air got to it it was going to burn up so we left it as was. The temperature is from 196°-208°. We looked out for it half of the night.

June 24th Stuart said they would try CO2 to cool it off. Mr. Bailey came down again to see the mow. Baled the hay up by woods to finish it. Put in other mow. 1400 bales in.

June 25th went down road and baled there and then back up by elms near the dump piece. About 1300 bales off it. Didn't quite finish all of it. Mow 210°

June 26th finished baling by dump piece. No more mowing. Hay is too hot. Put in about 900 bales to finish until find out about hay.

6-27 Bushey brought down CO2 tanks to put in mow today.

June 27 Stuart called about hay. Going to start using CO2 tomorrow. Mow is up to about 212°. Bob came.

6-28 Bushey put in some CO2 this morning. Stayed quite awhile. Stuart and Mr. Bailey came down. CO2 dropped the temperature to 190°. But later on in day went back up. So put more in. Came at night around 8:30 to put more in.

6-29 Hay mow reads 200°. Bushey put more CO2 in. He said would be down aroung 8 to do some more. Mr. Bailey came and asked how was doing. 180°

6-30 Broke probe. Took it to have fixed and someone broke the thermometer in it. Put more CO2 in it at 8:30. Stuart came down too.

July 1st. Mr. Bailey brought down a thermometer from Hoods $34. Harold wouldn't use it. So used the one from Linder Evaporator for $6. Hard to check with it. Cools off before can get to the top of the pipe. Reads about 180°. Bushey and Stuart came down again to put CO2 in mow. We went to Warners' for hamburg. Got back in time. Drew manure today.

July 2nd Got Hesston ready to mow hay tomorrow. Hay is still hot. Mow reads 200° Bushey and Stuart put in more CO2 dropped way down in temp. Drew some more manure up by dump. Let Jim mow way up back while milking. Going to wedding tomorrow for a break. Harold's father going to milk. Broke big belt on Hesston.

July 3rd told Jim to draw manure. Louie supposed to come and fix belt. Went to wedding. Louie didn't come. Hay mow 200°

July 4th finished mowing in moring. Baled about 4 loads (550) bales and David worked and drew them to barn. Hay mow about 204°. Told Stuart still hot. Agway coming down Tuesday to decide what to do. Cow knocked me down.

July 5th mowed by manure pile and rest of down road by woods. Fixed wagon wheels. My foot hurts. Went to Lake Carmi for the rest of the day. Got home about 10 of 6 to milk. Had a nice day. Crutches are hurting under my arms.

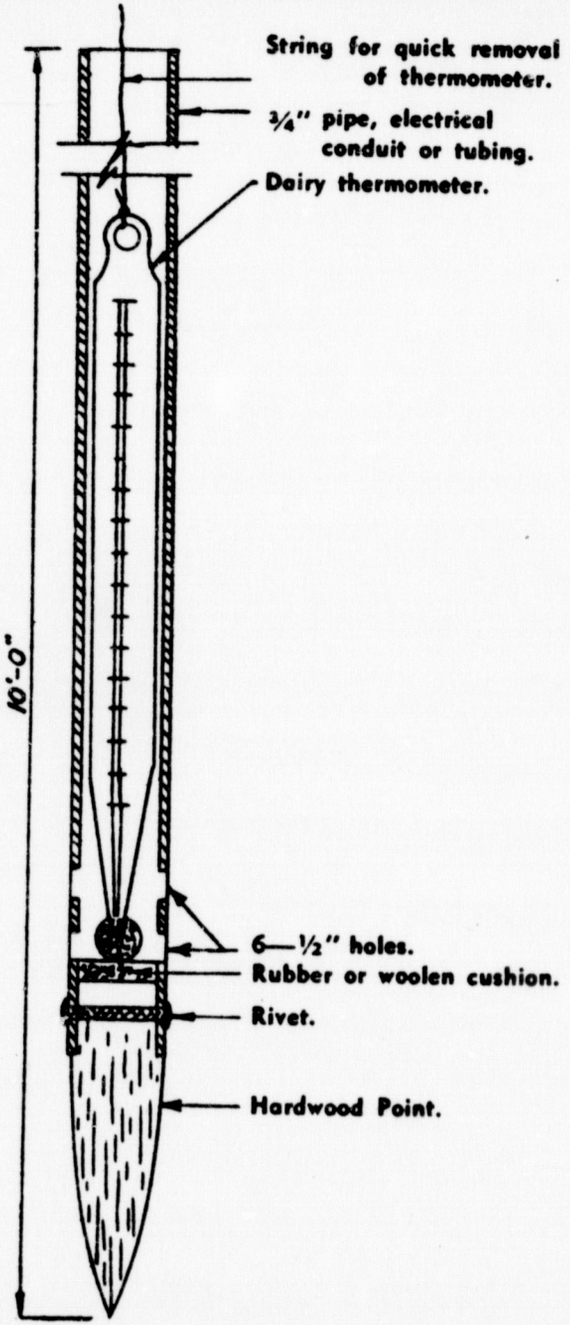
July 6th Agway (Bushey & Collingwood) came down to decide what to do. (About 8:30). Still on crutches. Going to take hay out on Thursday. Agway is bringing 5 men. David & Jim worked drawing and unloading own wagons. About 4 loads 550 baled. Hay mow is about 210° again.

July 7th Hired Larry. I went and got him about 11. I bought some brake pipes & fluid to fix big truck to put old hay in. Borrowed Marshall's hay wagon too. Put in a lot of hay (about 1600 bales today) Larry stayed over night to help take out hay. Agway brought down a water truck for tomorrow

7-8 slept good last night. Woke up at 4 in morning. I heard sounds like thunder in the distance. Like a storm building up. I opened my eyes and my bedroom was orange. I looked out the window and saw the barn all burning. I woke up Harold. Harold ran out and called fire dept. Woke up Larry and kids. Got kids outside. Everyone started coming and what a mess! ! Agway came four of them worked all day.

7-9 Two stayed on today and worked too.

July 8th milked cows to Dunemores' in morning. Drove down the road milked over to Bessettes at night.



APPENDIX
7a

Hay Probe Thermometer, showing construction of the point only. Entire probe is piece of ¾" pipe ten feet long which is driven deep into the hay for taking temperatures.

Be Sure . . . Not Sorry!

Remember — an ounce of prevention is worth a pound of cure. Only well-cured hay should be stored, unless you have a barn hay drier. All hay must be kept dry in storage. Moisture makes spontaneous combustion possible. But even if you feel sure that your hay will not heat, it will cost you very little to check up on it.

Cooperative Extension Work in Agriculture and Home Economics, State of Vermont. College of Agriculture, University of Vermont and United States Department of Agriculture, cooperating. J. E. Carrigan, Director, Burlington, Vermont. (Acts of May 8 and June 30, 1914)
Q—16—46 5 M—GLP

Will YOUR BARN Burn this Summer?

Danger of spontaneous combustion in hay demands spontaneous action to prevent it. Make a Hay Probe Thermometer and know the temperature of your mow[illegible] the danger is past.

HAY TEMPERATURES AND SPONTANEOUS COMBUSTION

Over $700,000 is lost each year because of Vermont's farm fires. More than half of these losses are due to barn fires. The overheating of hay, spontaneous combustion, is one of the biggest causes.

To be on the safe side, you should inspect your hay mows at least twice a week during the first two months after the hay has been stored. Fire from spontaneous combustion usually occurs within that period.

When your mow shows the first signs of heating, take the temperature of the mow and follow the suggestions given in this leaflet.

An easy way to take the temperature of your haymow is with a hay probe like the one shown in this leaflet, made easily and cheaply from materials right on the farm. It will cost only a few cents and may save you hundreds of dollars.

The probe should be pushed deep into the hay. Leave it in the hay long enough so that the actual temperature will be recorded. Then pull the thermometer out quickly and read the temperature. Use wads of hay to plug the holes left by the probe. Otherwise air may go down into the holes and if the hay is hot enough, a fire will start.

150° F. ENTERING THE DANGER ZONE. Temperature observations should be made daily.

160° F. DANGER! Temperature observations and mow inspections should be made every four hours.

175° F. HOT SPOTS OR FIRE POCKETS MAY BE ANTICIPATED. Stop all ventilation. Call Fire Department for standby service. Without doubt your fire insurance agent will cooperate gladly.

185° F. REMOVE THE HOT HAY. A fire department pumper with an ample supply of water should be ready to quench the flames which will probably develop when air comes in contact with the hot, spoiled hay. If water is used in the barn, remove all wet hay. Hot and charred hay should be deposited at a safe distance from the buildings.

210° F. CRITICAL! Hay is almost sure to ignite.

CAUTION! Workmen should not enter the mow alone or without ropes around their waists when there may be fire pockets in the mow, because there is danger of men dropping in them. Long planks may be placed across the top of the hay for workmen to stand on while making observations or removing hay.

APPENDIX 8a

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LAWRENCE MILLER
RICHARD L. HILL
PETER A. CADY

128 MERCHANTS ROW
SERVICE BLDG.

June 25, 1974

Hon. A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York 10007

Re: Harold Bigelow, et al v.
Agway, Inc. and Kemin
Industries, Inc.
Docket # 74-1268

Dear Mr. Fusaro:

Enclosed please find twenty-five (25) copies of Agway's Brief and Appendix.

Copies this day are being mailed to Langrock & Sperry, Attorneys for Appellants, Drawer 351, Middlebury, Vermont, 05753.

Cordially yours,

Lawrence Miller

LM/mc
Enclosures